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# National Sovereignty: Must it be Sacrificed to the International Criminal Court?\*

## I. INTRODUCTION

The essence of statehood, of being a country distinct from neighboring lands, is the capacity for self-determination. For centuries, if not for all of human history, sovereignty has been the core element of differentiation between groups, people, and nations. With the rise of international agreements, and the formation of multinational trading agreements, countries must face questions concerning national sovereignty that have never been encountered before. Clearly, increased involvement in international agreements and organizations will require countries to cede more and more sovereignty to international governmental organizations.<sup>1</sup>

International involvement between nations is not new.<sup>2</sup> The twentieth century, however, has seen an incredible increase in the number and variety of international organizations, including the failed League of Nations of the 1920s, other post World War I agreements, and the United Nations and Bretton Woods agreements following World War II. The second half of the century has seen a virtual explosion of governmental and non-governmental organizations operating in the world arena.

Despite the phenomenal growth of international cooperation and interdependency, the world is increasingly less humane. Conflicts generating Nazi-like atrocities have increased since the end of that regime,<sup>3</sup> as exemplified by ethnic conflicts in Rwanda, Bosnia, Indonesia, Sierra Leone, and Kosovo. In light of the increased willingness among some nations to use such heinous practices, many have concluded that an international tribunal of justice is needed.<sup>4</sup> War crimes trials at the end of

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1. See Patrick Tangney, *The New Internationalism: The Cession of Sovereign Competences to Supranational Organizations and Constitutional Change in the United States and Germany*, 21 YALE J. INT'L L. 395, 397 (1996).

2. See, e.g., HUGO GROTIUS, *DE JURE BELLI AC PACIS LIBRI TRES* (William Whewell trans., 1853).

3. See Daniel J. Brown, Note, *The International Criminal Court and Trial in Absentia*, 24 BROOK. J. INT'L L. 763 (1999).

4. See *New Impetus in Establishment of International Criminal Court*, AssA-Irada, Feb.

the two great wars of the century and the tribunals in operation in Rwanda and Bosnia are examples of the need of a permanent institution to those espousing this position.<sup>5</sup> Groups arguing for an international tribunal of justice were pleased with the acceptance of the International Criminal Court ("ICC") created by the treaty in Rome in 1998<sup>6</sup> and looked for its quick ratification by the national governments.<sup>7</sup>

The formation of the ICC opens the door to new and troubling questions concerning the future of international justice and its influence on national sovereignty.<sup>8</sup> This paper seeks to examine the rationale, formation, and current status of the ICC. Further, this paper seeks to analyze the hazards presented both by the ICC treaty and by the presumptions that underlie it. Section II examines the history and current status of the ICC. Section III explores several problems that are evident under the existing format of the ICC. Section IV proposes alternative solutions to the ICC that will be more respectful of national sovereignty.

## II. THE INTERNATIONAL CRIMINAL COURT

The formation of the ICC has been a project long in the making. Three trends have contributed to the creation of an international justice system: the evolution of violence, the expansion of the media's coverage, and an increased sensitivity to human rights. These trends are interrelated, each having played a role in the development of the others. War has evolved from the Nineteenth Century model where armies avoided civilian populations, to the Twentieth Century pattern of using any advantage, even the mass killing of civilians, to gain the upper hand. Along with the evolution of tactics, media awareness of atrocities

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15, 1999, available in 1999 WL 10613722.

5. See, e.g., M. Cherif Bassiouni, *From Versailles to Rwanda in Seventy-five Years: The Need to Establish a Permanent International Criminal Court*, 10 HARV. HUM. RTS. J. 11, 11 (1997) ("In the absence of such a court, not only have many atrocities gone unpunished, but every one of the ad hoc tribunals and investigations that has been created has suffered from the competing interests of politics or the influence of a changed geopolitical situation.").

6. The Convention for the formation of the ICC was held in Rome on July, 1998, and produced the Rome Statute, signed by most of the nations in attendance.

7. See John R. Schmertz, Jr. & Mike Meier, *By Large Majority, U.N. Conference in Rome Approves Permanent International Criminal Court*, 4 INT'L L. UPDATE 88 (1998) ("On July 17, after a number of stormy sessions, a mostly jubilant U.N. conference in Rome approved the 'Rome Statute of the International Criminal Court.' The vote was 120 to 7, with 21 abstentions. The United States, Israel and China were among those delegations that voted against the Convention . . . . The Convention will not enter into force until ratified by 60 nations.").

8. See Robert J. Howard, Comment, *An Economic Paradigm for the Debate Concerning the Jurisdictional Extent of the International Criminal Court*, 8 TOURO INT'L L. REV. 117, 118 (1998) (allowing personal jurisdiction from an international body creates the largest jurisdiction ever enjoyed). No wonder nations are nervous about the ICC.

has also increased. The advent of radio, newsreel film, television, and the Internet has brought war crimes increasingly to the attention of nations that are at peace. Finally, an increased awareness of human rights has generated the will and the capacity to create change without regard to national boundaries. Each of these factors has generated an increased desire among nations to find a way to deal with atrocities on the international level. The ICC has evolved from that desire, but it remains unclear whether such a tribunal appropriately addresses the rising tide of human rights abuses and whether individual nations will accept its jurisdiction.

### A. *A Brief History of International Justice*

The history of international justice is fraught with political concerns.<sup>9</sup> Following World War I, the Allies formed a tribunal to prosecute Kaiser Wilhelm II and Turkish leaders for starting the war.<sup>10</sup> The tribunal's powers included authority to prosecute German and Turkish military personnel for war crimes. Though charges were brought against Turkish officials for massive killings of Armenians in 1915, all were granted amnesty because the treaty on which the charges were based was never ratified.<sup>11</sup> This occurred in part due to the politics surrounding the rise of Communist Russia. The countries of the Western World felt they needed an ally in that region, so they rehabilitated Turkey for that role, and past offenses were forgotten.

The commission did not produce much better results in Germany. The Kaiser evaded prosecution.<sup>12</sup> Of nearly nine hundred individuals identified as war criminals, only forty-five were submitted to the German court for prosecution, and only twelve officers were ultimately prosecuted.<sup>13</sup> This emboldened the Nazi generation in Germany. Adolph Hitler, commenting on the lack of consequence for atrocities in World War I, said, "Who after all is today speaking about the destruction of the Armenians?"<sup>14</sup> The failure of the World War I tribunals

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9. See Bassiouni, *supra* note 5, at 12 (international tribunals have always been subject to "realpolitik goals").

10. See *id.*

11. See *id.* at 17. The treaty that was ratified, the Treaty of Lausanne of 1923, contained no provisions for prosecution, but did contain a provision granting amnesty. *Id.*

12. See Bryan F. MacPherson, *Building an International Criminal Court for the 21<sup>st</sup> Century*, 13 CONN. J. INT'L L. 1, 5-6 (1998) (the U.S. was opposed to prosecuting the Kaiser on the grounds that it would violate German sovereignty); Leila Sadat Wexler, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT'L L.J. 665, 668-69 (1996).

13. See Bassiouni, *supra* note 5, at 20. Another source puts the total of identified war criminals at 901. See J. Holmes Armstead, Jr., *The International Criminal Court: History, Development and Status*, 38 SANTA CLARA L. REV. 745, 746 (1998).

14. Bassiouni, *supra* note 5, at 21 (quoting JAMES F. WILLIS, PROLOGUE TO NUREMBERG:

sparked proposals for a permanent international criminal court, but in the face of the Great Depression, nothing developed.<sup>15</sup>

World War II tribunals fared somewhat better, but were still the tools of politicians more interested in global positioning than administering justice. The Nuremberg trials were born in political disunity. Great Britain desired immediate execution for Hitler and his colleagues because "their 'guilt was so black' that it was 'beyond the scope of any judicial process.'" <sup>16</sup> Stalin favored a special international tribunal just for Hitler, his advisers, and senior military leaders.<sup>17</sup> The United States and France favored a "tribunal to record history, educate the world, and serve as a future deterrent."<sup>18</sup> The trials began under the U.S. and French plan; however, British concerns that the trials would become a "forum for propaganda and self-justification" were well founded.<sup>19</sup> The USSR used the trials to accuse Germany of atrocities committed by Russian troops.<sup>20</sup> The United States accused Germany of deliberately encouraging Japan to bomb Pearl Harbor,<sup>21</sup> thus allowing the U.S. to claim they were victims of German aggression.<sup>22</sup>

The trials in Germany were also marked by hassles and delays because the officiating nations had disparate ideas on how to apply their different notions of justice. Defining the crimes subject to prosecution added to the problems as well. Finally, the advent of the Cold War left the West in dire need of a strong Germany, and in need of Nazi talent to confront the Communist threat.<sup>23</sup> Consequently, the number of trials decreased, sentences shortened, and many defendants were acquitted.<sup>24</sup>

The war crimes tribunals in Japan following World War II suffered

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THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 15 (1982) (quoting Adolf Hitler, Speech to the Chief Commanders and Commanding Generals on the Obersalzberg (Aug. 22, 1939)).

15. See MacPherson, *supra* note 12, at 7; Wexler, *supra* note 12, at 668-69.

16. Bassiouni, *supra* note 5, at 23 (quoting TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 29 (1992)); see also MacPherson, *supra* note 12, at 8; Wexler, *supra* note 12, at 672-73.

17. See Bassiouni, *supra* note 5, at 23-24.

18. *Id.* at 24.

19. *Id.*

20. See *id.* (citing J.K. ZAWODNY, DEATH IN THE FOREST: THE STORY OF THE KATYN FOREST MASSACRE 5 (1962)).

21. See Jeremy Rabkin, Editorial, *The Dangers of Indicting Milosevic*, WALL ST. J., Apr. 12, 1999, at A22.

22. See *id.*

23. Or, at least in need of keeping Nazi talent out of the hands of the USSR.

24. Even still, 20,000 individuals were tried with war crimes in the zone tribunals after the Nuremberg trials. However, of the 24 high Nazi officials indicted, three were acquitted, 12 were sentenced to death, and the remainder were sentenced to prison terms. See MacPherson, *supra* note 12, at 8-9.

similar problems. Although some individuals were prosecuted and sentenced, the process was inherently unfair and contrary to the rule of law.<sup>25</sup> Ultimately, with tacit approval from General MacArthur, Emperor Hirohito issued a proclamation of clemency for all that may have committed crimes during the war in 1946.<sup>26</sup>

Despite the mixed results in Germany and Japan, the Allies improved international justice. For example, the trials emphasized the principle that individuals, regardless of their position in the government, could be tried for violations of international law.<sup>27</sup> This principle implied that "individuals have international duties which transcend the national obligation of obedience imposed by the individual state."<sup>28</sup> However, brushed aside in the rush to impose justice was the consideration that this still represented the "victor's justice."<sup>29</sup>

These trials are not adequate models for current situations nor for the ICC. On the one hand, in both World Wars the international allies completely conquered the offending nations. The offending leaders were either dead, in custody, or at least potentially available for incarceration. Additionally, evidence was in the hands of the occupying forces. Lastly, these were international conflicts where the legal basis for international prosecution was stronger. On the other hand, Rwanda, Bosnia, and Kosovo (at present without a presiding tribunal) present much more complex situations. None of these nations has been overthrown by occupying forces. Therefore, the leaders responsible for the crimes remain in power or under the protection of the existing government. Evidence gathering is next to impossible when the responsibility remains in the hands of these governments that are generally hostile to the work of the tribunals. Finally, the legal basis for international prosecutorial intervention is more tenuous because these conflicts were civil wars, rather than international conflicts. Hence, although one may argue these recent tribunals are direct descendants from Nuremberg, they are actually very different.

Following World War II the United Nations (UN) was established and the work towards creating an international tribunal continued. Most

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25. See Bassiouni, *supra* note 5, at 33.

26. See *id.* at 34 (quoting R. John Pritchard, *The Gift of Clemency Following British War Crimes Trials in the Far East 1946-47*, 7 CRIM. L.F. 15, 24 (1996)).

27. See MacPherson, *supra* note 12, at 9.

28. *Id.*

29. See *id.* at 10. In addition, the laws applied to the World War II tribunals were frequently *ex post facto* in nature. See *id.* ("[The Allies] reasoned that liability may exist under international law even if the offense is not spelled out with the specificity of a penal statute, provided it is clear that the defendants knew that the conduct was wrong and fundamental principles of justice are not offended.").

of the effort before 1990 took the form of continuing the codification of international crimes.<sup>30</sup> Further development in the 1950s and 1960s was stymied due to disagreement over enforcement, jurisdiction, and other issues.<sup>31</sup> The growth of international drug trade renewed interest in an international tribunal in the 1980s, particularly with the plea for assistance from Trinidad and Tobago.<sup>32</sup> The explosion of ethnic and gender crimes in the former Yugoslavia and Rwanda brought the issue to the forefront of international attention and impelled the UN towards forming an international court.<sup>33</sup> The death of the bipolar Cold War world freed countries from East/West pressures and concerns and focused work towards an institution that had been on hold since World War II. The culmination of these efforts resulted in the treaty agreement of 1998, forming the ICC. The creators hoped that the days when one law was applied to the victors, and another to the vanquished would end, and that political pressure would be removed from the court.<sup>34</sup> This hope appears to be early and unsubstantial.

### *B. The Desire and Rationale for a Permanent Solution*

Clearly, the problems of international tribunals in the past, along with the worldwide increase in violence, have created the impetus towards a multilateral solution. From World War I to Bosnia and Rwanda, tribunals have been subjected to national interests and competing types of jurisprudence. Thus, there is a desire for a permanent system.

A permanent system would eliminate the necessity of establishing ad hoc tribunals every time the need arises. The decision to establish such tribunals, not to mention drafting the applicable statutes, takes considerable time during which the evidence of the crimes becomes more difficult to obtain, and the political will to prosecute dissipates. Moreover, a political debate is invariably reopened over the provisions of the statute, who will conduct the prosecutions, and who will sit in judgment. Such pressures leave ad hoc tribunals vulnerable to

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30. See Bassiouni, *supra* note 5, at 49-55. Codification of crimes was not without difficulty. For example, the definition of aggression took 20 years to develop, but was never voted upon in any setting. See *id.* at 54; Wexler, *supra* note 12, at 676-77.

31. See Brown, *supra* note 3, at 767. For an interesting debate from 1952, see John J. Parker, *An International Criminal Court: The Case for its Adoption* 38 A.B.A. J. 641 (1952), and George A. Finch, *An International Criminal Court: The Case Against its Adoption*, 38 A.B.A. J. 644 (1952).

32. See Brown, *supra* note 3, at 767.

33. See *id.*

34. See Bassiouni, *supra* note 5, at 49-55.

political manipulation.<sup>35</sup>

Much of the desire for a permanent solution arises from the international abhorrence of the atrocities committed in intra and international conflicts. This abhorrence leads to several policy rationales supportive of an international court. The first rationale is deterrence. Many people believe that if a permanent court will punish international crimes, such as genocide and crimes against humanity, such punishment will deter future potential criminals.<sup>36</sup> While this is a general principle of criminal justice that is demonstrable at the local level, deterrence becomes more theoretical and less capable of proof at the national and international level. Nevertheless, supporters of the ICC hold to deterrence as an important rationale.<sup>37</sup> Some people are concerned that the furtherance of human rights in the world will be stymied as long as there is no price to be paid for violating those rights. They argue that "[i]mpunity not only encourages the recurrence of abuses against human dignity, but also strips human rights and humanitarian law of their deterrent effect."<sup>38</sup>

Creation of a permanent court would remove the accusation that has dogged the ad hoc tribunals. Critics have attacked each of the previous attempts at international tribunals as "victor's justice,"<sup>39</sup> in part due to the lack of universality and specificity in international law.<sup>40</sup> While some movement has occurred in the UN to standardize and codify international crimes, the structure for the international court has not kept pace until this decade.<sup>41</sup> Whether, with the signing of the Rome treaty, the legal structure of the international court is sufficiently in place to avoid its use as a political tool is yet unclear.

Another rationale for the creation of the ICC is to address serious,

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35. *Id.* at 60-61.

36. *But see Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing before the Subcomm. on Int'l Operations of the Senate Comm. on Foreign Relations*, 105th Cong. 1, 29 (1998) [hereinafter *Senate Hearing*] (testimony of John Bolton, former Assistant Secretary of State for International Organization Affairs).

37. *See* Claudio Grossman et al., *International Support for International Criminal Tribunals and an International Criminal Court*, 13 AM. U. INT'L L. REV. 1413, 1417, 1436 (1998). Senator Arlen Specter states, "I strongly believe that deterrence is a big factor in life. If you prosecute and punish people and they know that punishment is a possibility, it will affect their conduct. I believe that what is going on right now in The Hague is very important as an international precedent and as a matter of deterrence." *Id.* at 1417.

38. Jelena Pejic, *Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness*, 29 COLUM. HUM. RTS. L. REV. 291, 292 (1998).

39. Good examples of victor's justice were the tribunals in Japan after World War II. *See* Bassiouni, *supra* note 5, at 31-37.

40. *See* Armstead, *supra* note 13, at 748.

41. *See id.*



but heretofore unprosecuted war crimes.<sup>42</sup> For example, the use of rape as a tool of "ethnic cleansing" in the former Yugoslavia focused the world's attention on gender crimes. Upon closer inspection, most of the wars of the Twentieth Century contain documented evidence of rape as a tool of conquest and domination.<sup>43</sup> In spite of the documented evidence of rape in Nazi Germany and Imperial Japan during World War II, neither the Nuremberg nor the Tokyo Charter enumerated rape as a crime against humanity.<sup>44</sup> Rape was not included in "crimes against humanity" until the Geneva Conventions of 1949.<sup>45</sup> Therefore, the creation of the ICC afforded the opportunity to codify laws on rape that previously received only oblique reference in international agreements.<sup>46</sup>

Fairness in the judicial process is also cited as a reason for the establishment of the ICC.<sup>47</sup> For example, many times tribunals are organized to deal with war crimes solely to punish the vanquished. These tribunals are, therefore, open to the valid criticism that their purpose is just to achieve "victor's justice" and that the tribunals are in use only to exact retribution for the terrors of war.<sup>48</sup> As Justice Murphy said in his dissent in *In re Yamashita*, "If we are ever to develop an orderly international community based on a recognition of human dignity, it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness."<sup>49</sup> Additionally, some countries' legal systems do not meet international standards of fairness or due process, even in domes-

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42. Recent events in Sierra Leone have avoided the headlines, but are indicative of the kinds of atrocities the ICC hopes to punish. See David J. Scheffer, *Deterrence of War Crimes in the 21<sup>st</sup> Century* (visited Sept. 23, 1999) <<http://www.iccnw.org/html/scheffer.html>>.

43. See Nicole Eva Erb, Comment, *Gender-Based Crimes Under the Drafts Statute for the Permanent International Criminal Court*, 29 COLUM. HUM. RTS. L. REV. 401 (1998) (relating and citing the rape of Chinese women by Japanese soldiers invading Nanking, Nazi soldiers raping Jewish and Soviet women, Korean women forced into sexual servitude by the Japanese, several rapes of Vietnamese women by American troops at the My Lai massacre, Iraqi soldiers raping women during the invasion of Kuwait, rapes of female supporters of Aristide occurring during the military coup in Haiti, Hutus raping Tutsis and vice versa in Rwanda, and military officials of all sides raping targeted ethnic groups in the former Yugoslavia).

44. See *id.* at 408-10 (stating that the Tokyo charter did include rape as a violation of recognized customs and conventions of war).

45. See *id.* at 410-411.

46. See *id.* at 407 ("Traditionally, international legal instruments have not explicitly addressed the crime of rape or other gender-based crimes committed in armed conflicts.").

47. See MacPherson, *supra* note 12, at 17.

48. See *id.* The imposition of a foreign version of justice increases the sense of being wronged by the process as well. This imposition may increase the sense that such justice is just further violence. See *infra* note 172.

49. *In re Yamashita*, 327 U.S. 1, 29 (1946) (Murphy, J., dissenting).

tic cases.<sup>50</sup> The ICC is offered, therefore, as a means of standardizing justice and supplanting the legal systems of countries that are otherwise incapable of rendering a fair verdict.

Other reasons supporting the establishment of the ICC include the ad hoc tribunal's lack of consistency and failure to establish precedent. Past ad hoc tribunals have been marked by a singular lack of consistency and lack of judicial memory.<sup>51</sup> "From a legal standpoint, ad hoc tribunals cannot hope to achieve a desired level of consistency in the interpretation and application of international law because their statutes are inevitably tailored to meet the demands of the specific situation that brought them into being."<sup>52</sup>

A related concern, in addition to consistency, is whether the political will exists from crisis to crisis to establish a tribunal.<sup>53</sup> Many people fear that judicial fatigue will set in, resulting in crimes going unpunished. Questions are naturally raised concerning why one conflict deserves a tribunal and another does not.<sup>54</sup> For example, the UN established tribunals for the former Yugoslavia and Rwanda, but not for Iraq, Somalia, or Sudan. If there were a permanent ICC, the will required to begin an investigation into atrocities would not depend upon the politics of the UN or national leaders.

Another reason favoring the establishment of a permanent court is that countries rarely punish war criminals on their own.<sup>55</sup> Frequently, the end of conflict brings a desire to return to normalcy. Additionally, conflicts often end with a negotiated settlement between the warring parties. Settlement often includes amnesty as a condition for the cessation of hostilities, freeing otherwise criminally negligent individuals from prosecution. New governments may also include individuals who are responsible for war crimes. Such countries are naturally unwilling to prosecute war criminals.<sup>56</sup> Supporters of the ICC claim that a permanent international institution would have the political distance necessary to bring these criminals, regardless of their positions, to justice.

A structural argument for the establishment of the ICC also exists. The creation of a permanent court would be beneficial to the international community because it would help address what some internation-

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50. See *id.* at 18.

51. See MacPherson, *supra* note 12, at 23. The legal systems of smaller countries may be intimidated or overwhelmed with the problem of dealing with international criminals. See *id.*

52. See Pejic, *supra* note 38, at 293.

53. See *Senate Hearing*, *supra* note 36, at 35 (testimony of Michael P. Scharf in support of the International Criminal Court).

54. See Pejic, *supra* note 38, at 293.

55. For example, Chile has not prosecuted General Pinochet.

56. See Pejic, *supra* note 38, at 292.

alists see as the main failings of the international system of justice, the lack of a permanent and effective enforcement mechanism.<sup>57</sup> The establishment of a permanent court would enable the international community to enforce the law, hence meeting all the goals.<sup>58</sup> However, many things must be presumed to reach that conclusion. An international enforcement mechanism would require either vast national cooperation or some kind of international police force. Neither is likely to be greeted with much favor by most nations. Therefore, it is presumptuous to see the ICC as establishing an international law enforcement mechanism.

### C. *The International Criminal Court Treaty*

The International Criminal Court treaty was signed in Rome on July 17, 1998. Delegates met for five weeks before they brought the proposed treaty language into a form upon which a vote could be taken.<sup>59</sup> The vote resulted in 120 delegations voting in favor, seven against, and twenty-one abstaining.<sup>60</sup> The United States, China, and Israel were among those voting against the treaty. The primary reasons for their "no" vote was the broad jurisdiction and the independence of the prosecutor.<sup>61</sup>

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57. See *id.* at 294.

58. See *id.* at 328-29.

In the 50 years since the Nuremberg trials, massive human rights and humanitarian law abuses have been committed—and continue to be committed—worldwide. While the international community finally seems poised to end impunity and strengthen deterrence by creating a permanent International Criminal Court, the outcome of this effort remains uncertain. Guided primarily by political, rather than legal considerations, states risk establishing a judicial body that will not be able to fulfill its important tasks. A permanent International Criminal Court must be independent and effective if it is to meaningfully strengthen accountability for egregious crimes of concern to the international community. This means that the exercise of the ICC's jurisdiction must not be stymied by political considerations and that the court must be able to effectively prosecute and punish the perpetrators of international crimes once its jurisdiction has been established. There should be little doubt that the structure set up in Rome will not be amenable to easy change. All efforts should therefore [sic] made to ensure the creation of a viable institution that will withstand the test of time. Countless victims of past and current atrocities deserve no less.

*Id.*

59. See Brook Sari Moshan, Comment, *Women, War, and Words: The Gender Component in the Permanent International Criminal Court's Definition of Crimes Against Humanity*, 22 *FORDHAM INT'L L.J.* 154, 170 (1998). This author's description of the conference is inaccurate because it implies the treaty language was developed by the delegates. The delegates actually worked from the draft prepared by the UN Preparatory Committee.

60. See *id.* As of April 13, 1999, 81 countries had signed the treaty. See *Czech Republic Signs Statute on International Criminal Court*, Czech News Agency, Apr. 13, 1999, available in 1999 WL 15623755 [hereinafter *Czech News*].

61. See Moshan, *supra* note 59, at 170-71. In spite of these objections, the U.S. delegation, as of the Preparatory Commission held in July and August, 1999, seemed willing to sign the treaty if they could arrange protection from prosecution for U.S. military personnel and others.

## III. WHAT IS WRONG WITH THE INTERNATIONAL CRIMINAL COURT?

There are many inherent problems with the International Criminal Court, some of which are unavoidable. Some non-governmental organizations (NGOs) have touted the court as an answer to the problems encountered with the ad hoc tribunals in the former Yugoslavia and Rwanda. These problems include the logistics of transporting witnesses and defendants and having thousands (in Rwanda) awaiting trial with little movement towards that end.<sup>62</sup> An ICC seated at The Hague would solve neither of these problems. The problems of transporting witnesses, defendants and attorneys (not to mention housing and feeding them) and obtaining passports and visas increase by having the tribunal outside the country where the crimes were committed.

In addition, there is no resolution in the ICC for a second problem: many people are accused and there are too few judges. In its current conception, the court will not have the capacity to operate more than a few trials at a time.<sup>63</sup> Proponents of the court point to this issue as a reason to allow future growth in the size of the court.<sup>64</sup> However, it is difficult to imagine an international court large enough to handle thousands of trials in a timely fashion, as the Rwandan situation would require, and yet remain affordable to the world community.

Currently, a single prosecutor oversees both the Rwandan and Bosnian courts, resulting in the problem of overseeing institutions thousands of miles apart.<sup>65</sup> While having a centralized court will relieve some of the problems of oversight,<sup>66</sup> it will exacerbate the problems of discovery in the nations where the crimes occurred. On-site prosecutors have a difficult time gathering evidence. Adding thousands of miles of travel will only further complicate the process.

A counter argument to this problem with the ICC might be that the prosecutor could rely on the legal structure of the countries involved to provide the "on the scene" assistance, like discovery. This may be available in some instances, but it flies in the face of one of the original presumptions of the ICC. The court presumes that after an armed conflict not every country has, or will have, a legal system in place to perform such tasks. Physical distance will still hamper evidence gathering

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62. See Brown, *supra* note 3, at 771; see also Prosecutor v. Aleksovski (Prosecution Response to the Defense for Provisional Release 3.2.5) ICTY Case No. IT-95-14/1-PT (Jan. 14, 1998) (visited Sept. 17, 1999) <<http://www.un.org/icty/pressreal/p288-e.htm>> ("The tribunal in Yugoslavia has indicated that incarceration for 577 days while awaiting trial is reasonable.").

63. See MacPherson, *supra* note 12, at 56.

64. *Id.*; see also *infra* Part III.D.

65. See Bassiouni, *supra* note 5, at 48.

66. See Brown, *supra* note 3, at 771-72.

and discovery where there is no credible legal system in place to do it for the court. Reliance on local legal systems is also problematic because it depends on their willingness to assist. Discovery is nearly always an adversarial situation. Attempting to use local law enforcement when it too may be resistant will defeat such efforts completely. The touted swift justice<sup>67</sup> simply will not occur.

### A. *Intrusion on National Sovereignty*

Perhaps the central issue facing the ICC is its effect on sovereignty. However, most commentators plunge ahead, either tossing the issue aside as unimportant in the modern world<sup>68</sup> or waving it as a standard that should be held inviolate.<sup>69</sup> In light of the unthinking treatment sovereignty normally receives, consideration of the differing perceptions will be helpful. It is presumptuous to believe that all members of the world community accept the same definition of sovereignty as the United States. Sovereignty for an American, and for any person from a country based on a similar form of government, devolves from the people, not the state. Other nations perceive sovereignty as a national right belonging to the government. For nations that accept the latter definition of sovereignty, ceding it to an international entity is less troublesome. However, for individuals and nations that accept the definition of sovereignty as a power and right emanating from the people, cession to international entities is very troublesome. John Bolton, former assistant Secretary of State, described this theoretical divide:

One of the executive branch's strongest powers is the law enforcement power. In the United States we accept this enormous power because we separate it from the adjudicative power and because we render it politically accountable through Presidential elections and congressional oversight. . . . Europeans may feel comfortable with the ICC structure, no political accountability and no separation of powers, but that is a major reason why they are Europeans and we are not.<sup>70</sup>

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67. See *id.* Justice has been anything but swift in Rwanda, where most detainees remain in prison years after apprehension and without a trial. A member of the International Criminal Tribunal for Rwanda (ICTR) at the July PrepCom for the ICC reported that many of the oldest and youngest detainees have been released without trial. Apparently, neither the Tribunal nor the Rwandan government had the funds to continue maintaining the prisoners while awaiting the glacial process of justice.

68. See Grossman et al., *supra* note 37, at 1438; Tangney, *supra* note 1, at 397.

69. See Gary T. Dempsey, *Reasonable Doubt: The Case Against the Proposed International Criminal Court* (July 16, 1998) (visited Sept. 23, 1999) <<http://www.cato.org/pubs/pas/pa-311.html>>.

70. *Senate Hearing*, *supra* note 36, at 31 (testimony of John Bolton).

Indeed, in the United States, ceding the "national" sovereignty presents problems that go to the core of the nation's legal structure. Thus, understanding there the are different perceptions of the meaning of sovereignty helps in appreciating the motivations of both those who signed and those who refused to sign the treaty. It also aids in recognizing the perceptions that different nations have of how the ICC will affect them.

The ICC treaty establishes personal jurisdiction over the individuals in the member states.<sup>71</sup> Necessarily, personal jurisdiction by an international organization raises sovereignty issues. Many proponents of the ICC minimize the potential intrusions on sovereignty that may occur. "Sovereignty concerns will have to be addressed; but . . . international law is gradually moving away from a State-centrist approach towards a more moral, human rights approach. It is imperative that this reality be recognized in the jurisdiction and the powers of the court."<sup>72</sup>

International law may well be moving away from a state-centered approach, but that movement is not rapid. The formation of the World Trade Organization and the number of years required to come to an agreement in the Uruguay Round of GATT is strong evidence of the importance nations place on sovereignty. Perhaps more importantly, the actions of countries in the past decades are even more indicative that overcoming sovereignty by a single treaty is a mere dream.<sup>73</sup>

A crucial test for the ICC will take place over sovereignty. The individual, not the nation, will be subject to the jurisdiction of the court. Thus posing the question whether nations would "run the risk of having their nationals sent to be tried by judges possibly from enemy or rogue nations."<sup>74</sup> Will nations be willing to see their troops, acting as peacekeepers on foreign soil, come under the criminal jurisdiction of this court?<sup>75</sup> The answer for many nations, the United States likely included, will be no.<sup>76</sup> Nations that would cede to the jurisdiction over their citizens would also face the temptation of allowing jurisdiction only when it suited their political goals.<sup>77</sup> Therefore, the ICC would find coopera-

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71. See Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999, 1003 (1998).

72. Grossman et al., *supra* note 37, at 1438.

73. See Robert F. Drinan, *Is a Permanent Nuremberg on the Horizon?*, FLETCHER F., Summer/Fall 1999, at 103, 105.

74. Christopher L. Blakesley, *Obstacles to the Creation of a Permanent War Crimes Tribunal*, FLETCHER F., Summer/Fall 1999, at 77, 90.

75. This concern is certainly on the minds of the Clinton administration and the U.S. Senate. See *Senate Hearing*, *supra* note 36, at 17-21.

76. See Drinan, *supra* note 73, at 107 (pointing out that the U.S. might have been deterred from some of its international interventions had Washington been concerned about individual soldiers, generals, or political leaders being haled before an international court).

77. The Human Rights Watch expresses the concern that nations will avoid jurisdiction by

tion only when a nation deemed it expedient. The experiences of the International Court of Justice and the World Court are instructive. Developed nations frequently ignore rulings or refuse to be subject to the courts when it is in their interest to do so.<sup>78</sup>

Even some who espouse the concept of an ICC acknowledge the problem that sovereignty presents:

States are understandably jealous of their right to investigate and try international criminals in their own courts. National pride leads states to have faith in the competency and fairness of their domestic judicial systems. They do not want to surrender control over criminal cases to another tribunal. Certainly, with the exception of the core crimes, states are capable of prosecuting the majority of international crimes fairly and effectively, and the Statute [for the International Criminal Court] should encourage national prosecutions when feasible. Moreover, victimized states have incentives to pursue cases that an international tribunal might lack.<sup>79</sup>

This observation implies that, in most situations, nations do not need (and frequently will not want) the ICC because their legal systems are capable of handling most of the issues. Historically, nations punished for their violence dealt with in a punitive way after a violent period tend to make poor members of the world community. Nations allowed to resolve their own crimes while receiving different international aid fare much better.<sup>80</sup>

An additional problem that the above quote addresses is the issue of parity. For example, "[w]hile the United States might take satisfaction in conducting trials of those who commit war crimes against its military personnel, that satisfaction would hardly be worth the discomfort of seeing American servicemen on trial in Baghdad or Tripoli."<sup>81</sup> Any de-

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invoking a "national security" privilege. See Human Rights Watch, *Section M: The Protection of National Security* (visited May 5, 1999) <<http://www.hrw.org/reports98/icc/jitbwb-15.htm>>. It states, "[National security] must be balanced against other important and potentially competing interests. These would include the interests of victims, and of the international community as a whole . . . . Deference to a national security must be tempered by the need to ensure the protection of international security, which is seriously compromised by the commission of heinous crimes and the impunity that so often surrounds them." *Id.*

78. See *Senate Hearing*, *supra* note 36, at 6 (statement of Senator Jesse Helms) (recalling the World Court's attempt at exercising jurisdiction over the U.S. for its support of the Nicaraguan Contras, and the fact that the U.S. ignored the court due to lack of jurisdiction).

79. See MacPherson, *supra* note 12, at 40.

80. For example, compare post WWI Germany with post WWII Germany. Nuremberg may have had some influence, but with the immediate rise of the Cold War, most of the resolution of national and individual culpability was left to the Germans. Supporting the thesis of this paper, Germany's judicial system was rebuilt by the Allies, and has become one of the most credible in the World.

81. See MacPherson, *supra* note 12, at 42; see also Howard, *supra* note 8, at 123-24.

veloped nation would feel similarly. Therefore, the likelihood of having such investigations by the ICC ignored is high. The U.S. delegation attempted to resolve this at the Rome Conference by preserving the right of reservation to specific aspects of the treaty. This proposal was soundly defeated by the rest of the delegates. While there may remain the option of amending the treaty, some groups are adamantly opposed to such a thought. They fear that amendments to the ICC, particularly by powerful nations, would only make it a tool of the UN Security Council<sup>82</sup> and likely administer only "victor's justice."

The U.S. delegation to the Rome Conference refused to sign the treaty for a related concern. In its final form, the treaty extended the court's jurisdiction to situations where only one party of the dispute came from a signatory member.<sup>83</sup> This amounted to an indirect grant of jurisdiction over any person involved in the state where the crimes occurred, regardless of whether their nation was subject to the ICC. The U.S. delegation argued that this would create a situation where

[M]ultinational peacekeeping forces operating in a country that has joined the treaty can be exposed to the Court's jurisdiction even if the country of the individual peacekeeper has not joined the treaty. Thus, the treaty purports to establish an arrangement whereby U.S. armed forces operating overseas could be conceivably prosecuted by the international court even if the United States has not agreed to be bound by the treaty.<sup>84</sup>

The U.S. delegation sought to amend this section, but were overwhelmingly defeated.<sup>85</sup> Therefore, the treaty signed in Rome may violate national sovereignty by indirectly allowing jurisdiction over nations that chose not to be a signatory. A logical ramification of this is that nations will be less inclined to send troops to participate in peacekeeping missions,<sup>86</sup> therefore, diminishing security in some parts of the world. Primarily for this reason, although the Clinton administration favored the ICC, the U.S. delegation refused to sign the treaty.<sup>87</sup>

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82. See MacPherson, *supra* note 12, at 42 (citing Daniel H. Derby, *An International Criminal Court for the Future*, 5 TRANSNAT'L L. & CONTEMP. PROBS. 307, 311 (1995)).

83. See Rome Statute of the International Criminal Court, *supra* note 71, at 1010-11; *Senate Hearing*, *supra* note 36, at 12 (testimony of Ambassador David J. Scheffer).

84. *Senate Hearing*, *supra* note 36, at 13 (testimony of Ambassador David J. Scheffer).

85. See *id.* at 12.

86. See *id.* at 13.

87. See *id.* at 15-16 ("Our position is clear. Official actions of a non-party state should not be subject to the Court's jurisdiction if that country does not join the treaty, except by means of Security Council action under the UN charter. Otherwise the ratification procedure would be meaningless for governments."). Ambassador Scheffer, in response to queries by the Senate, stated that de facto universal jurisdiction, and the independence of the prosecutor were two of the most significant factors leading to his refusal to sign the treaty. See *id.* For another perspective,



State cession of sovereignty would cut against both states where the crimes occur and those states trying the crimes.<sup>88</sup> For example, the state where the crimes are committed must cede its sovereignty in order for the court to operate there. In addition, cases may arise where national courts try individuals extradited from the state where the crimes occurred. The sovereignty of the trying state would also be subject to abridgement as well, because ICC complementarity is merely a cover for judicial review. Judicial review occurs when the ICC exercises its power to review whether a state court is unwilling or unable to prosecute individuals the ICC has determined fall under its jurisdiction.<sup>89</sup> The ICC, in this way, may become a part of the state legal process<sup>90</sup> by reversing or upholding decisions of what were previously courts of last resort.

Supporters of the ICC have overlooked a singular feature of sovereignty. Senator John Ashcroft, of the Senate Committee on Foreign Relations, stated, "If there is one critical component of sovereignty, it is the authority to define crimes and punishment. This court strikes at the heart of sovereignty by taking this fundamental power away from individual countries and giving it to international bureaucrats."<sup>91</sup> Senator Ashcroft, expressing the sovereignty concerns he felt for the United States, continued,

No aspect of the Court is more troubling, however, than the fact that it has been framed without apparent respect for—and indeed in direct contravention of—the United States Constitution . . . .

. . . .

The proposed court . . . neither reflects nor guarantees the protections of the Bill of Rights. The administration was right to reject the Court and must remain steadfast in its refusal to join a court that stands as a rejection of America's constitutional values.<sup>92</sup>

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Pierre Sane, the Secretary General of Amnesty International, "expressed his regret that a few powerful countries appeared willing to hold justice hostage by threatening and bullying other states, and seemed sometimes to be more concerned to shield possible perpetrators from trial rather than producing a charter for victims." *International Criminal Court—Crippled at Birth?* (visited Mar. 19, 1999) <<http://www.hri.ca/urgent/icc-0722.shtml>>.

88. See Sandra L. Jamison, *A Permanent International Criminal Court: A Proposal that Overcomes Past Objections*, 23 DENV. J. INT'L L. & POL'Y 419, 432 (1995) ("[T]he absolute doctrine that a state is supreme in its own authority, and need not take into account the affairs of other nations, is no longer tenable.").

89. See *infra* Part III.E.

90. See Dempsey, *supra* note 69.

91. Senate Hearing, *supra* note 36, at 8.

92. *Id.* at 9. Senator Ashcroft concludes:

In Monday's *New York Times*, there is an opinion piece in which Anthony Lewis

A cession of sovereignty that abrogates the fundamental principles of any country, whether that sovereignty be the ability to define crime and punishment or the establishment of constitutional principles, is a cession that cuts too deep. Perhaps the biggest problem with attempting to sign away such sovereignty is that nations will not abide by it,<sup>93</sup> and therefore, the credibility of the court will be diminished, rendering it a toothless institution.

### *B. Textual Ambiguities and Inadequacies*

Criminal law is successful, as well as consistent and fair, when each crime has elements that must be proven in order to convict a defendant. Not only does the ICC fail to contain specific elements for crimes, it fails to adequately define the core crimes. For example, the delegates insisted on including the crime of "aggression" but utterly failed to define it.<sup>94</sup> Defining aggression has proven to be incredibly vexing, and there is no clear resolution in sight.<sup>95</sup> The possibility exists that there will be concurrent and differing definitions of aggression within the UN architecture, leading to inconsistent and unjust application of international law. For example, the ICC may find itself at odds with the Security Council over whether aggression has occurred. This would enmesh the court in the very political thicket the drafters of the

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chastises the United States for missing a historic opportunity by failing to vote in favor of the International Criminal Court. The author states that the vote to form the International Criminal Court "will be seen as a turn in the road of history." That is perhaps the only point in the piece with which I agree. The approval of this Court was indeed "a turn in the road of history." By ceding the authority to define and punish crimes, many nations took an irrevocable step to the loss of national sovereignty and the reality of global government. I, for one, am heartened to see that the United States took the right turn on the road of history, and I will work hard to ensure there is no backtracking.

*Id.* at 10.

93. See *Senate Hearing*, *supra* note 36, at 19-20 (questions from Senator Jesse Helms, answers by Ambassador David J. Sheffer). This problem is foreshadowed by the fact that a number of countries have constitutional prohibitions on extraditing their citizens to any other nation. Therefore, these countries would have to cede this civil right in order to comply with the ICC statute. See *id.*

94. See *Czech News*, *supra* note 60. Nine months after the Rome Conference, the UN Preparatory Commission is still attempting to resolve this definition. See *id.*

95. See MacPherson, *supra*, note 12, at 50.

The United States [delegate] explains the problem:

[I]t is not at all universally established what fits even within the limited concept of "waging a war of aggression." What are the possible defenses or mitigating factors . . . ? What if it concerns a disputed territory? Where there is a conflict that is settled by reference to the International Court of Justice, for example, does the losing party automatically become guilty of an aggressive war? What about controversial concepts such as humanitarian intervention or a war of liberation?

*Id.*

ICC sought to avoid.<sup>96</sup>

Elements of crimes and rules of procedure shared a similar fate in the drafting of the ICC treaty. In the UN Preparatory Committee (PrepCom) meetings shortly before the Rome conference, the United States delegation pushed for definition of the elements of three core crimes: genocide, other crimes against humanity, and war crimes. The other states involved argued there was not time to do this and that the priority should be on agreeing to the crimes covered by the convention. They also argued that since this was a common law approach, definition of elements could wait until after the signing of the statute.<sup>97</sup> Since the conference and signing of the treaty, the PrepCom has made little progress in formulating elements or rules of procedure for the court.<sup>98</sup> As of March 1999, the Commission had only agreed to a goal of June 30, 2000 to have *draft* versions of these rules and elements completed.<sup>99</sup> Apparently, its hope is that states will ratify the treaty without knowing the treaty's final contents.<sup>100</sup> So far only one state, Senegal, has done so.<sup>101</sup>

The concerns raised by the United States early in the negotiating stage about elements to the crimes appear well founded.<sup>102</sup> At the March 2, 1999, PrepCom meeting, delegates circulated discussion pa-

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96. See *id.* at 49. (MacPherson's solution to the problem is to remove the prerequisite of having the Security Council determine if such an act has occurred. Also, because the definition of aggression is so difficult to nail down, it ought to be omitted as a term in the jurisdiction of the court until it is properly defined). See *id.* Press commentary on the NATO bombing of Yugoslavia may be indicative of the potential quagmire ahead of the court in defining aggression. See Czech News, *supra* note 60 ("The concept of 'aggression,' which is only mentioned in the current version of the statute, is currently being considered by the Preparatory Commission for the Court set up by the UN. The results of the negotiations should be interesting in view of the current air attacks on Yugoslavia.").

97. See Christopher Keith Hall, *The Sixth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 AM. J. INT'L L. 548, 551 (1998).

98. See UN: Preparatory Commission for International Criminal Court concludes first session at HQ, M2 Presswire, Mar. 2, 1999, available in 1999 WL 12607695.

99. See *id.*

100. The mandate of the UN Secretary General, Kofi Annan, is otherwise. Addressing the opening of the Preparatory Commission meeting in February 1999, he stated, "[Y]ou have to elaborate clear and unambiguous rules on the practice of the Court, and on the elements of the crimes over which it has jurisdiction." *Establishing International Criminal Court will be Fitting way to Inaugurate New Millenium*, M2 Presswire, Feb. 17, 1999, available in 1999 WL 12605514.

101. Senegal's signing was a move similar to signing a contract before material terms are settled.

102. Nonetheless, some groups saw U.S. actions as obstructive. Jelena Pejic, a member of the Lawyers Committee for Human Rights, stated, "Washington is attempting to redefine the crime of genocide until it is 'virtually impossible to prosecute.'" Betsy Pisik, *U.S. Seeks Changes to Accept International Criminal Court; Wants to Safeguard Troops from Frivolous Lawsuits Abroad*, WASH. TIMES, Feb. 26, 1999, at A17, available in 1999 WL 3078969.

pers that indicated genocide was still a definition in progress.<sup>103</sup> The Rome treaty stated, "‘genocide’ means any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group."<sup>104</sup> A discussion paper at the March PrepCom meeting defined genocide somewhat differently:

[T]he crime of genocide was the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. Genocide shall also occur if the accused knew or should have known that his or her actions would destroy a group or the conduct was part of a pattern of similar conduct directed against that group . . . . Genocide by killing would occur if the accused killed one or more persons of a group in furtherance of the intent to destroy it.<sup>105</sup>

Granted, the discussion paper is a work in process, not intended to be a final draft. Nevertheless, it is clear in the differences between the two that adoption and modification of elements may shift the intent of the treaty. The treaty did not indicate that the killing of one person would be sufficient to commit genocide. Whether or not delegates would have signed the treaty with the language of the discussion paper included is not known. Those believing that the Rome statute is the final word are likely to be disappointed. They are likely to be subject to a different law than they originally thought.

Definitional ambiguity is also highly problematic because of the philosophical underpinnings of criminal law.

The interest in ensuring that crimes are carefully defined stems from the widespread agreement that the court adhere to the principle of legality. This fundamental principle of justice requires that there may be no crime or punishment without a preexisting law that prohibits the conduct and sets the penalty (*nullum crimen, nulla poena, sine lege*). It reflects the conviction that criminal law is intended to guide conduct and can do so only if people know in advance what is prohibited.<sup>106</sup>

Therefore, the signing of a treaty purporting to adhere to these rule of law principles, when in fact few of the details are worked out, puts the credibility of the court into question even before it is formed. For example, the definition of genocide includes "[i]mposing measures in-

103. The Clinton administration has not been clear on its definition either. See Stephen J. Morris, Editorial, *Clinton's Genocide Confusion*, WALL ST. J., Jan. 12, 1999, at A22.

104. Rome Statute of the International Criminal Court, *supra* note 71, at 1003.

105. UN: *Preparatory Commission for International Criminal Court concludes first session at HQ*, M2 Presswire, Mar. 2, 1999, available in 1999 WL 12607695.

106. MacPherson, *supra* note 12, at 51 (footnotes omitted).

tended to prevent births within the group.”<sup>107</sup> A number of interpretations are possible from this, ranging from Nazi-style forced sterilization to UN-sponsored birth control programs.<sup>108</sup> The discussion paper from the March PrepCom meeting does little to clarify: “Genocide by preventing births would occur if the accused imposed measures that were intended to prevent births within a group.”<sup>109</sup> Unlike the other elements of genocide referred to in the discussion paper, birth prevention did not include an intent element. Therefore, it makes no improvement on the treaty language. In order for the statute to make sense, ambiguities such as these must be resolved.

Another inherent problem of ambiguity lies beyond the lack of definition of the elements in that the ICC prosecutor decides when to investigate based on referrals from any source.<sup>110</sup> He or she need only convince two of the three judges in the Pre-Trial council to proceed to prosecution.<sup>111</sup> This means that justiciability may differ depending on a variety of circumstances rather than on a pre-determined policy. If the bar of justiciability is left too low, or open to broad interpretation, the Court risks being overrun with cases of little international significance.<sup>112</sup> If the bar is too high, the Court is not credible because serious crimes go unpunished.

### C. Court Politics

If the Rome Convention is any indication, this Court will not escape the extreme political pressures that characterized its inception. At the conference, when some delegates from conservative countries discovered language espousing a broad definition of gender,<sup>113</sup> the negotiations intensified substantially.<sup>114</sup> Additionally, some countries became concerned that the language of the treaty criminalizing enforced pregnancy and enforced motherhood might result in an international challenge to anti-abortion laws.<sup>115</sup> Another attempt was made by some

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107. Rome Statute of the International Criminal Court, *supra* note 72, at 1003.

108. Even with the intent requirement for genocide this would still be a legitimate claim. An individual could argue that such a program is intended to reduce the population of a group.

109. UN: Preparatory Commission for International Criminal Court concludes first session at HQ, M2 Presswire, Mar. 2, 1999, available in 1999 WL 12607695.

110. See *infra* Part III.F.

111. See Rome Statute of the International Criminal Court, *supra* note 71, at 1022, 1032; see *infra* note 160.

112. See Howard, *supra* note 8, at 121 (“The defining line between a crime against one human, and crimes against humanity in general is, at best, vague.”).

113. Some groups pushed for acceptance of language describing five different genders.

114. See Moshan, *supra* note 59, at 154, 178-79.

115. See *id.* at 175-76.

groups to get the delegates to agree on language that would remove the element of intent as a requirement for gender crimes. These attempts also became hotly debated issues, resolved by the delegates only in the final hours of the convention.<sup>116</sup> Proponents of these issues were not pleased with the outcome and later complained that the statute failed to protect women.<sup>117</sup>

Another dubious political move involved jurisdiction over terrorism and drug trafficking.<sup>118</sup> The United States and other countries have been involved for years in the process of formulating the ICC, and had come to an agreement leaving drug and terrorism crimes outside its jurisdiction.<sup>119</sup> Nevertheless, they discovered on the last day of the Rome conference that a small group of delegates had altered the text of the statute to include these crimes within the Court's jurisdiction.<sup>120</sup>

This would not be the only issue at the Rome conference decided behind closed doors by a small cadre of representatives.<sup>121</sup> On the last day of the conference, the treaty contained a stipulation barring states from taking reservations from portions of the statute that might conflict with their domestic laws.<sup>122</sup> The U.S. delegation had expected the treaty to include a right of reservation and was displeased at the last minute alteration.<sup>123</sup>

The United States was not the only country subject to political maneuvering. Israel chose not to sign the treaty because the article describing war crimes would have criminalized the settlements on the West Bank and Gaza Strip.<sup>124</sup> Further, at a PrepCom meeting on the

116. See *id.* at 178 n.152. The definition of gender was narrowed to "male and female" as a concession to Islamic states agreeing to the "inclusion of rape, forced pregnancy, and sexual slavery." Not all women's groups were pleased with this result. See *id.*

117. See *id.* at 178.

118. See *Senate Hearing*, *supra* note 36, at 14 (testimony of Ambassador David J. Scheffer).

119. The U.S. feared the court would interfere with existing drug and terrorism interdiction programs and agencies in a detrimental way.

120. See *Senate Hearing*, *supra* note 36, at 14 (testimony of Ambassador David J. Scheffer).

121. See *id.* at 15; David J. Scheffer, *America's Stake in Peace, Security, and Justice* (visited Mar. 19, 1999) <[http://www.state.gov/www/policy\\_remark1998/980831\\_scheffer\\_icc.html](http://www.state.gov/www/policy_remark1998/980831_scheffer_icc.html)>.

122. See *Senate Hearing*, *supra* note 36, at 15 (testimony of Ambassador David J. Scheffer).

123. Another concern the U.S. delegation expressed was that "the judges [selected would] not be confined to those from democratic countries with rule of law. The judges [would] be elected by a super majority of the state parties. Given that, the group of 77 developing countries in the U.N. General Assembly, which routinely vote against the United States and which is really more like 160 countries, could represent such a majority." See *id.* at 3 (opening statement of Senator Rod Grams) (expressing concern that ICC judges would be drawn disproportionately from countries unfriendly to the U.S. and from court systems vastly different from the U.S.).

124. See Marilyn Henry, *'Palestine' Seeks Recognition on New International Criminal Court*, JERUSALEM POST, Feb. 28, 1999, available in 1999 WL 9000054; Rome Statute of the International Criminal Court, *supra* note 71, at 1007 (stating that the direct or indirect transfer of

elements of crime, Israel objected to the Arab States' draft proposal giving a Palestinian state UN recognition.<sup>125</sup> Alan Baker, head of the Israeli delegation, declared, "The UN by definition is a political organization, so even when you are getting together to produce a statute for an international criminal court, which should not be something political, you inevitably get politically motivated activities."<sup>126</sup>

Perhaps political pressures are inherent in a convention seeking to produce a treaty.<sup>127</sup> However, a process that includes last minute changes not subject to the negotiation process does not bode well for the entity under creation. Such actions diminish the sense of ownership and loyalty that negotiators might otherwise feel towards the agreement because the pact then includes a position that could not have won on its own merits.

Another example of the political pressure on the ICC is evident in the attempts to alter terms of the treaty after signing. Some groups, seeing the current version as best representing their interests, oppose any alteration at all.<sup>128</sup> The U.S. delegation, however, has made it clear that "key aspects of the treaty must be changed or the United States will actively work against it."<sup>129</sup> The U.S. is not the only force seeking changes in the treaty. Even among signatories, efforts are afoot to alter it. For example, in the first session of the PrepCom to establish rules of procedure and evidence, the French delegation introduced a proposal not fully in harmony with the text of the treaty. While stating that the "statute was a package that was completely supported by France," their proposal "did not digress profoundly" from it.<sup>130</sup>

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the population of an occupying nation into the occupied territory is a war crime); Worldsources Online, *Overcoming Reticence on International Criminal Court*, WORLD TIMES, May 5, 1999, available in 1999 WL 15653415 [hereinafter Worldsources Online]. The U.S. Senate also expressed concern over this issue. See *Senate Hearing*, *supra* note 36, at 23-25 (acknowledging that Israel would be exposed to liability under the ICC Statute).

125. See Henry, *supra* note 124.

126. *Id.*

127. See Worldsources Online, *supra* note 124. Other numerous political moves at Rome included India's attempt to include the use of weapons of mass destruction as a crime. See *id.* Upon having this motion voted down, the Indian delegation complained, "The message this sends is that . . . the international community has decided that the use of nuclear weapons is not a crime." *Id.* Sri Lanka and Turkey abstained from the vote because terrorism was not included as a crime. See *id.* China agreed with the U.S. that universal jurisdiction on core crimes and the power of the prosecutor were too broad, and voted against the treaty. See *id.* Singapore abstained, objecting to the last minute changes worked behind closed doors by a small number of delegations, and objecting to other issues. See *id.*

128. Richard Dicker, legal advocate with Human Rights Watch, stated, "Protocol aimed at fixing what the United States objects to in this treaty could unravel this complex document." Pisik, *supra* note 102.

129. *Id.*

130. UN: *Preparatory Commission for International Criminal Court begins first session*, M2

Perhaps some departures are necessary to transform a treaty into a working document. Nevertheless, political pressure to alter the nature and scope of the ICC is omnipresent. Nations and interest groups, opposing the ICC, have applied substantial political pressure to date. It is foolish to believe that such pressure will diminish once the court is fully established. The treaty keeps the door to politics ajar by allowing an elective procedure on various court issues by member states in the future. While oversight and control by the member states is necessary to maintain some semblance of a consensus-based organization, the opportunity to employ political pressure on the court in the future is troubling. It places political jockeying ahead of judicial distance. Due to its immersion in ongoing international politics, the credibility of the court will always be in danger.<sup>131</sup>

#### *D. Mission Creep: Can the ICC Refrain From Expanding?*

The Rome Treaty intends to create a court to handle world war crimes on the rationale that the ICC will deter would-be perpetrators.<sup>132</sup> However, by providing for substantial future growth in the treaty, supporters appear to disbelieve that result. Senator Rod Grams, chairman of the Senate Subcommittee on International Operations, stated:

Supporters of this treaty are banking on the fact that the United States will allow this court to flourish and gain legitimacy over time. We must not allow that to happen. Even if it is weak at its inception, the Court's scope and its power can and will grow. This court will be an international institution without checks or balances, accountable to no states or institution for its actions, and there will be no way to appeal its decisions except through the Court itself.<sup>133</sup>

The Senator's concerns are well founded. Proponents of the court pushed for the Rome treaty signing without having elements or rules of procedure in place. The crime of "aggression," according to the negotiators, need not be defined until at least seven years after ratification.<sup>134</sup>

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Presswire, Feb. 17, 1999, available in 1999 WL 12605515.

131. For example, the political hazards of bringing Slobodan Milosevic to justice present just such a minefield. See Rabkin, *supra* note 21.

132. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, INTERNATIONAL CRIMINAL COURT BRIEFING SERIES, VOL. 2 NO. 3 (1999) [hereinafter LAWYERS COMMITTEE]; but see Dempsey, *supra* note 69 ("[T]here is no evidence that holding war crimes trials reduces the number of threats to international peace and security. If anything, the opposite is true: making war less atrocious makes it more likely.") (quoting Alfred P. Rubin, *Dayton, Bosnia and the Limits of Law*, 46 NAT'L INTEREST 44 (Winter 1996-97)).

133. *Senate Hearing*, *supra* note 36, at 3 (opening statement of Senator Rod Grams).

134. See Rome Statute of the International Criminal Court, *supra* note 71, at 1004, 1067. It should be noted that negotiations on the definition of "aggression" have proceeded informally during the PrepComs in 1999. Further, Phillippe Kirsch, Chairman of the PrepComs, announced in



The presumption of a growing jurisdiction, not only in territory, but also in types of crimes as well, is evident throughout the statute and in the statements of its supporters. For example, it is not sufficient for the court to address only a narrow class of international crimes. Some see the court as ultimately "act[ing] as a standard setting mechanism in the interpretation and application of international law and provid[ing] a model for national authorities in the administration of criminal justice."<sup>135</sup> Placing the ICC as the interpreter of international criminal law dramatically exceeds the scope and intent of the Rome Statute. Nevertheless, if the court is successful, it may serve such a purpose. However, to hope that it will provide a model for national administration of criminal law implies a role all nations would find offensive because it implies they are incapable of developing a legitimate legal system.

While some developing nations may look to the ICC to model their criminal code, most developed nations would resist such a model in favor of their system already in use. It is conceivable that reformers would seek to leverage change in their national judicial systems through seeking to expand the influence of the ICC into the domestic sphere. An obvious area where this would likely occur is capital punishment. If the ICC were to become the model of criminal justice, nations continuing to impose capital punishment would come under increasing pressure to alter their laws to conform to the international standard. Indeed, minority interests (including individual defendants with creative defense attorneys) could seek to use the ICC standard to overcome majority chosen positions in criminal law.

A troubling presumption of the proponents of the ICC is that institutional durability requires the ability to grow.<sup>136</sup> Their concern is that the world will use the court so infrequently that it will be incapable of garnering respect.

The real threat to the court's stature is the prospect that it will be little used. If the international court is to command respect, it must have sufficient jurisdiction to play a real role in the struggle against inter-

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August that beginning in the November/December PrepCom, aggression would receive full treatment with formal and informal working groups meeting to discuss the definition.

135. LAWYERS COMMITTEE, *supra* note 132.

136. See MacPherson, *supra* note 12, at 56. MacPherson uses the United States Supreme Court as an example of how a court with a flexible size and description can well serve its constituent nation. See *id.* His antecedent complaint is the inability of the Court to try more than two cases concurrently. See *id.* The author seems to want to argue for the ability to expand the number of judges on the Court as need arose. See *id.* Using the U.S. Supreme Court as a desirable example of flexibility does not support this position. The U.S. solution to increasing case load has not been to increase the number of judges on the Supreme Court, rather, the Court has been given power to decline review, and does so in the vast majority of cases. This model would likely be rejected for an international court.

national crime. There is no danger that the court will be trivialized as long as it is making a valuable contribution to criminal justice.<sup>137</sup>

Hence, the presumption of the ICC's supporters is that it will be used and expanded as necessary into the future. This presumption is troubling for two reasons. First, if respect for an institution depends on usage, then those in the institution will see that it succeeds. It is the nature of any organization to justify its existence. Second, this position argues against the premise of deterrence. If the court is a successful deterrent, it cannot grow without expanding the list of crimes under its jurisdiction.

Mission Creep is also evident in the rhetoric of those urging that the court's jurisdiction should not be limited to specific crimes.<sup>138</sup> Allowing the court to try crimes outside the list of most heinous international crimes will further intrude upon state sovereignty. Consequently, the role of national judicial systems will be further eroded. Also, hearing any case containing an international or transnational element that exceeds the current scope of court jurisdiction, will create precedent that could expand the role of the court beyond its treaty.

### *E. Determination of Justice*

The purpose of a court is to determine what is just between a plaintiff and a defendant. The ICC complicates this process by claiming concurrent, or complementary, jurisdiction over some crimes. The stated ICC goal of complementarity<sup>139</sup> is troubling because it appears to be unworkable. According to the treaty, the ICC will share jurisdiction over the named crimes with the national court system, only stepping in when the national system is "unwilling or unable genuinely to carry out the investigation or prosecution."<sup>140</sup> Article 17 of the Rome statute lays out the factors to determine unwillingness:

2. In order to determine unwillingness in a particular case, the court shall consider, having regard to the principles of due process recognized by international law, whether one or more of the following exist, as applicable:

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court . . . ;

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137. *Id.* at 46.

138. *See id.* at 48.

139. *See* Rome Statute of the International Criminal Court, *supra* note 71, at 1002-03.

140. *See id.* at 1012.

(b) There has been an unjustifiable delay in the proceedings . . . inconsistent with an intent to bring the person . . . to justice;

(c) The proceedings were not or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person . . . to justice.<sup>141</sup>

Article 17 also includes the elements for determining inability on the part of the national courts: "The court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the state is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."<sup>142</sup> Therefore, although the stated goal of the court is to complement national court systems, the treaty clearly outlines processes for judicial review of national court decisions.<sup>143</sup>

There are, however, three problems with allowing the ICC to review national court action. First, the statute provides no standard for judging its own terms. How long a delay in a national court will the ICC consider unjustifiable? Will it look to the national court system, or other UN court actions like the international tribunals in the former Yugoslavia and Rwanda?<sup>144</sup> When will the ICC deem a national court too partial or dependent? The statute is silent on these issues.

The second prong of the problem with judicial review is that it may create another level of appeal for defendants before national courts. A national decision on a case having international parties, falling within or near the jurisdiction of the ICC, might produce an appeal by the losing party. The problem with such a scenario is that it exposes complementarity to be a sham.<sup>145</sup> If individuals are capable of appealing out of the court of last resort of their nation to the ICC, then the ICC will enjoy de facto judicial review. Such review will result in the imposition of ICC legal theory upon the national court systems.

A final troubling concern over de facto judicial review is that the statute would require judicial investigations to avoid ICC review. For example,

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141. *Id.*

142. *Id.*

143. *But see* Human Rights Watch, *Section E: Complementarity* (visited May 5, 1999) <<http://www.hrw.org/reports98/icc/jitbwb-07.htm>>.

144. One wonders, given the lengthy incarcerations of suspects in Rwanda by the international tribunal, whether that court would not be considered "unwilling" under the Rome Statute.

145. *See* Dempsey, *supra* note 69 (positing that complementarity means the ICC could not overcome the verdict of a national trial or legislation, therefore the ICC would have to exercise judicial review to achieve its ends).

[I]f an ICC prosecutor wanted to investigate and charge the President of the United States for a bombing raid like the one President Reagan conducted in Libya, our only way to prevent the case from going forward would be to have our own Justice Department investigate the President. If the U.S. Government then declined to prosecute, it would still be up to the judgment of the ICC whether to prosecute and pursue the case.<sup>146</sup>

Such an outcome is another example of the incredibly intrusive nature of the ICC statute.<sup>147</sup> The prosecutor's ability to initiate an investigation based on a referral from NGOs, becomes the power to force such actions within a nation. This imposition will be unpalatable to any nation so coerced.

#### *F. The Vast Authority of the Prosecutor*

The Rome Statute grants broad powers to the prosecutor's office of the ICC.<sup>148</sup> For example, the prosecutor may investigate alleged crimes based on the referral of the UN Security Council, state parties, victims, NGOs, or any other reliable source.<sup>149</sup> The prosecutor determines the reliability of the source, as "he or she deems appropriate."<sup>150</sup> Some groups tout the ability to obtain referrals from non-state sources (NGOs, victims, etc.) as a most important victory because they feared states would be unwilling to refer situations to the court.<sup>151</sup> While states or the UN Security Council may indeed be less willing to refer situations to the prosecutor at times, it is transparently obvious that some groups will refer situations frequently. This may result in an inundation of referrals from some groups or individuals.

A hazard in allowing NGOs to refer is that the political leanings of the prosecutor may become involved in the decision to investigate. Hence, the propensity of the prosecutor to agree or disagree with the group may determine the furtherance of the investigation. A prosecutor may investigate, or refuse to investigate, dependent on her ideological kinship with the referring group; the prosecutor might see the investi-

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146. See *Senate Hearing*, *supra* note 36, at 2 (opening statement of Senator Rod Grams).

147. See Rabkin, *supra* note 21. It may be just as difficult to prosecute Slobodan Milosevic for the ethnic cleansing of Kosovo. See *id.*

148. See *Senate Hearing*, *supra* note 36, at 26-28 (testimony of Ambassador David J. Scheffer) (acknowledging the powers and limitations of the office of prosecutor). Prosecutors with any semblance of independence are currently disfavored in the U.S. See Rabkin, *supra* note 21.

149. See Rome Statute of the International Criminal Court, *supra* note 71, at 1011.

150. See *id.*

151. See Human Rights Watch, *Summary of the Key Provisions of the ICC Statute* (visited May 5, 1999) <<http://www.hrw.org/hrw/campaigns/icc/icc-statute.htm>> [hereinafter *Key Provisions of the ICC Statute*].

gation as an opportunity to further or stymie a political goal depending on the source of the referral.<sup>152</sup>

The United States and several other nations felt this power was too broad. This feeling formed one of the reasons for not signing the treaty. Senator Rod Grams articulated this concern in a hearing before the U.S. Senate: "[T]he [ICC] prosecutor will have the power to initiate prosecutions without a referral from the Security Council or state parties. There will be no effective screen against politically motivated prosecutions from being brought forward."<sup>153</sup> Ambassador Scheffer suggested that there existed a legitimate reason for referrals to come from member states or the Security Council. He made the following statement:

The value of having a government refer it or the Security Council refer it is they are accountable to somebody. They are accountable either to their people, their populace, for doing so, or the Security Council is accountable to the United Nations system. We believe that that fundamental principle of accountability should be at the core of referrals to this court.<sup>154</sup>

The Pre-Trial Chamber of the court has the power to deny the furtherance of an investigation by the prosecutor.<sup>155</sup> Nevertheless, the prosecutor has the power to investigate situations with no oversight before she must submit it to the Pre-Trial Chamber.<sup>156</sup> In addition, she may return with a new request based on new evidence regarding the same situation.<sup>157</sup> Therefore, a persistent prosecutor, backed by groups or individuals, may pursue a particular individual or group she believes responsible for a crime until the Pre-Trial Chamber allows the investigation to proceed towards court action. Also, even with the Pre-trial Council, decisions to prosecute can be made by three persons. For international crimes of the magnitude this court is designed to deal with, three seems to be a small number.<sup>158</sup>

Proponents of the court claim that the power of the prosecutor is quite limited. However, outside of having to meet some requirements

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152. See *Senate Hearing*, *supra* note 36, at 23 (testimony of Ambassador David J. Scheffer).

153. See *id.* at 3 (opening statement of Senator Rod Grams).

154. *Id.* at 23.

155. See Rome Statute of the International Criminal Court, *supra* note 71, at 1011.

156. See *id.* at 999. This includes the power to go to the site of a crime, talk independently to witnesses and collect evidence. See *id.* When national authorities are investigating, the prosecutor may still be present, and may still take voluntary testimony outside of the national investigators presence. See *id.*

157. See *id.* at 1011.

158. This process is further evidence of the immense power of the ICC judges and prosecutor.

before investigating within a state,<sup>159</sup> the limitations they cite are dubious at best. The limitations they point to arise in Article 53 of the treaty and consist mainly of a set of factors the prosecutor should consider before pursuing an investigation. Article 53 states:

The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this statute. In determining whether to initiate an investigation, the Prosecutor shall consider whether:

- (a) The information available . . . provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
- (b) The case is . . . admissible under article 17; and
- (c) Taking into account the gravity of the crime and the interest of the victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.<sup>160</sup>

These discretionary considerations amount to limitations addressing only whether a crime has been committed, whether jurisdiction exists, admissibility of evidence, and other potential overriding political concerns. These reservations are minimal. The statute contains qualifications that allow the prosecutor to have great leeway in initiating investigations. For example, "reasonable basis" is a low bar to investigation. Therefore, the discretion of the prosecutor is quite broad,<sup>161</sup> extending to all aspects of evidence gathering, taking of oral and written testimony, and so forth.<sup>162</sup> One of the greatest concerns expressed by non-signing nations is the prosecutor's power to initiate an investigation without supervision of any kind. Nothing in the treaty appears to limit this power.

#### IV. A PROPOSED SOLUTION FOR INTERNATIONAL CRIMINAL JUSTICE

Something must be done on the international level to address the

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159. See *Senate Hearing*, *supra* note 36, at 27 (testimony of Ambassador David J. Scheffer) (indicating that the prosecutor must work cooperatively with national authorities, and that he or she does not have ready access throughout the world).

160. Rome Statute of the International Criminal Court, *supra* note 71, at 1028. The remainder of Article 53 spells out the Prosecutor's duties if he or she chooses not to continue the investigation, and the Pre-Trial Council's power of review of such a decision. See *id.*

161. See *supra* Part III.F.

162. Claims that the prosecutor's power is limited are questionable. For example, the Human Rights Watch lists the Pre-Trial Council's power to review a decision NOT to investigate as the main limitation. See *Key Provisions of the ICC Statute*, *supra* note 151. Review of a decision not to prosecute in no way limits decisions to prosecute. See *id.*

problem of atrocities and war crimes. Jose Avala Lasso, the UN High Commissioner for Human Rights stated that it is an "obscurity" that "a person stands a better chance of being tried and judged for killing one human being than for killing 100,000."<sup>163</sup> Such a record is intolerable. If the ICC is untenable because of its effects on state sovereignty, what should the international community do? Several ideas are worthy of consideration.

With the end of Apartheid and the election of Nelson Mandela, South Africa seemed poised to commence the process of tribunals to address past crimes. Instead, South Africa opted for a more conciliatory approach. The Truth and Reconciliation Commission was established to address human rights abuses during Apartheid. The commission has emphasized gathering information over assigning guilt, and has even extended pardons for individuals who cooperate. It is not clear what the result will be, nor is it clear that this would be the best approach to replace the ICC. Nevertheless, it is an alternative worth considering.<sup>164</sup> The Truth and Reconciliation Commission's approach to international situations may allow for speedier national and ethnic healing, though it may not fully address the retributive feelings of the victims. The problem with such an approach, in addition to lacking an element of punishment, is that it requires a stable, credible government to operate it. Additionally, internationalists would worry that the actions of such a commission would become a sham to protect the guilty.<sup>165</sup>

Another alternative to the ICC would be to continue with the ad hoc tribunals similar to those operating in Rwanda and the former Yugoslavia. The ability to address issues on a case-by-case basis would offer greater flexibility to the tribunals, and allow international intervention to bring perpetrators to justice. Presumptively, there would be less concern of "victor's justice" because of the international involvement. The court could minimize transportation and evidence-gathering costs by operating in the country where the crimes occurred, rather than at a distance. The tribunals in Rwanda and the former Yugoslavia have not been problem free. Those favoring, as well as those opposing the ICC cite these tribunals to support their positions. It may be, however, that if the ad hoc tribunal approach had time to ripen as an international process, it would prove to be a successful and efficient way of dealing with the core crimes of the ICC statute.

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163. Wexler, *supra* note 12, at 711 (quoting *International Criminal Tribunal for the Former Yugoslavia Bulletin*, No. 8, 10-VII-1996, at 1).

164. See *Senate Hearing*, *supra* note 36, at 51 (prepared statement of John R. Bolton).

165. See *id.* at 51-52 (pointing out that there may be some instances where a full public airing of past misdeeds would be more harmful than helpful).

Perhaps the best alternative to the ICC that would help preserve national sovereignty while addressing the pertinent crimes, would be to allow states to handle such prosecutions domestically.<sup>166</sup> The United Nations involvement in this regard would be to help developing countries create judicial systems that are credible within the scope of national law. The UN could accomplish this by establishing international judicial standards palatable to both civil and common law traditions, and offering aid in the form of funds and expert consultants to assist countries in the development of their judicial systems. With a solid judiciary in place, nations could deal with the human rights crimes that might occur. Some may wonder how national tribunals would deal with individual perpetrators at high levels of government, and argue this is precisely the reason an ICC is needed. However, if the national justice system could not address such individuals, the political process certainly could. Therefore, with international guidance to help stabilize national legal and political systems, nations could handle their own human rights abuses.<sup>167</sup>

Perhaps the greatest lesson of international intervention has been this: until local populations and governments are ready and capable of dealing with their problems on their own, the problems remain unresolved regardless of the number of peacekeepers and foreign aid. It may be that John Bolton is right when he said, "[t]o create an international tribunal for the task [of rendering justice] implies immaturity on the part of [the nations] and paternalism on the part of the international community. Repeated interventions by global powers are no substitute for [the nation] coming to terms with themselves."<sup>168</sup>

Given the imperialistic past (and present) of the developed world, international intervention in the form of ad hoc tribunals or of an international criminal court may be perceived as the imperialism of the new millenium.<sup>169</sup> States already rail at the orientation of the legal philosophy of the ICC. When fully implemented, some may rightly fear that once again, the wealthy industrialized world will impose its values on developing nations.<sup>170</sup>

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166. Perhaps one way to support domestic prosecution is to work towards an international treaty on extradition that would require signers to release criminals responsible for international crimes to national jurisdictions seeking them. See MacPherson, *supra* note 12, at 20.

167. Handling these issues on a national basis would also serve the purpose of leaving national legal philosophies intact, without imposing a foreign notion of justice on a nation.

168. See *Senate Hearing*, *supra* note 36, at 52 (prepared statement of John R. Bolton).

169. See, e.g., Rabkin, *supra* note 21 ("Somebody might even get into [Slobodan Milosevic's] head that Serbs too, can demand 'justice' for attacks on civilian targets designed to terrorize people into submission.").

170. For an alternative view on resolving international crime, see Carrie Gustafson, Comment, *International Criminal Courts: Some Dissident Views on the Continuation of War by Penal*



## V. CONCLUSION

Finally, the ICC fails to address the problem that it identifies. Justice is an attempt to set things right, after the crime has been committed. The genocide, ethnic cleansing, and mass rapes have been committed long before the judicial process can begin. By the time evidence has been gathered and suspects apprehended, the value of the judicial remedy begins to degrade, particularly when dealing with crimes on a massive scale. Ultimately, life incarceration remains unlikely for the chief perpetrators if historical precedent means anything.<sup>171</sup> Therefore, any deterrent value that the establishment of the ICC might have is likely only to persuade nations sending peacekeeping troops to think twice before doing so.

The international community appropriately desires the end to crimes against humanity, war crimes, genocide, and aggression. The experience of generations has been that punishment, while important, is at best a poor remedy for the victims. The victim's greatest desire is to avoid victimization in the first place. Therefore, the best solutions to today's humanitarian crises lie not in adjudication that is too late for the traumatized victims, but in prevention. Perhaps Carrie Gustafson is right, and justice such as is envisioned by the ICC should be abandoned because it only perpetuates violence.<sup>172</sup> Perhaps adherence to the tenets of the world's greatest moral and ethical philosophers would provide a better solution to both international crime and punishment.<sup>173</sup> Prevention, whatever its form, of war and criminal activity may be as difficult to achieve as effective punishment provided for by the ICC. The ICC statute and the premises underlying it are unacceptable, primarily because of the unprecedented erosion it would work on state sovereignty. Finding a means to prevent crime renders the court unnecessary, and therefore, prevention is the more laudable international goal.

David A. Nill

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*Means*, 21 Hous. J. Int'l L. 51 (1998).

171. *See id.* Though the Rome Statute states that all individuals, regardless of position, are equally liable to investigation and prosecution, state cooperation will not be equally available depending on the position and popularity of the suspect. *See id.* Therefore, state leaders will remain much less likely to be prosecuted than lower level functionaries. *See id.* This is true even of national leaders considered to be perpetrators. *See id.*

172. *See* Gustafson, *supra* note 170. Incarceration as penology forms the basis of the ICC, and it is this type of penology that Gustafson avers perpetuates violence. *See id.*

173. *See id.*